IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 158 OF 1991

1. **Smt. Parvatibai Krishna Keripale**
   aged about 57 years,

2. **Sou. Kama @ Mahadevi Murgendra**
   Kore, aged about 26 years

3. **Kum. Chandrabhaga @ Chanda d/o. Krishna Keripale,** aged 23 years
   All agriculturists, Nos. 1 and 3 residents of Sangli, No.2 of Ashta Tal. Valwa, Dist : Sangli. **... Appellants (Original Petitioners)**

Versus

1. **The State of Maharashtra**

2. **Datta Krishna Keripale,**
   aged about 40 years, resident of Patil Galli, Gaonbhag, Sangli.

3. **Sou. Vimal w/o. Appa Sungare,**
   aged about 42 years, resident of Kavathe-Mahankal, Dist-Sangli... **Respondents (Original Caveators)**

Adv. Mr. R.S. Apte with Mr. Ashutosh Gole for Mr. B.P. Apte, Advocate for Appellant

Mr. Y.M. Nakhwa, A.G.P. for Respondent No.1

Mr. T.S. Ingale, Advocate for Respondent No.2

*CORAM : **S.R.SATHE,J.***
*DATED : **25/08/2006***

ORAL JUDGEMENT :-

1. Appellant-original Petitioner in MA-128-983 have preferred this appeal against judgement and order

passed by the Court of Second Additional District Judge, Sangli in Regular Civil Appeal No.300 of 1985, whereby the judgement and order passed by the Second Joint Civil Judge, Senior Division Sangli dismissing the Petitioners' Petition for letters of administration under section 276 of Indian Succession Act, 1925 was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Appellant' and 'Respondent'.

2. The brief facts giving rise to this appeal are as under :-

The Appellant No. 1 is the second wife of Late Krishna Yashwant Keripale while the Appellant Nos.2 and 3 are the children of Appellant No.1 from Late Krishna. The Respondent Nos. 2 and 3 are the son and daughter of Late Krishna from his first wife Shrimanti. Late Krishna had several self acquired properties. He executed a will dated 09/04/1974 and then it was registered on 10/04/1974. Krishna died on 21/07/1991.

3. According to Appellant, Appellant No.1 came to know about the execution of the will when she received it through post. Hence she filed MA 128 of 1983 under

section 276 of the Indian Succession Act for obtaining letters of administration.

4. The Respondent who had filed a caveat filed Written Statement and contended that the market price of the property in question is more than Rs. 3 lakhs and proper Court Fee has not been paid by the Appellant/Original Petitioner. The Respondent also contended that Krishna was suffering from Asthma for a period of about 8-10 years prior to his death. Due to his illness and constant medication, he had become mentally and physically weak. They also contended that the alleged will is false and the thumb impression appearing on the will is in fact not of Late Krishna. They also contended that at the time of alleged execution of will, Krishna was not in disposing state of mind. The Respondent/ Caveators also contended that the Appellant/Original Petitioner No.1 i.e. Second wife of Krishna used to dominate Krishna. By taking undue advantage of Krishna's mental and physical disability, the alleged will was got executed by bringing pressure on deceased Krishna and in collusion with the other witnesses. The Respondent, therefore, prayed for the dismissal of the application.

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5. On these pleadings, the learned Trial Judge framed issues. In order to prove their case, the Appellant-original Petitioner examined as many as five witnesses consisting of original petitioner No.1 i.e. Parvati Keripale (Exh-27), two attesting witnesses namely Bhalchandra Baburao Diwale and Dhodiram Babu Chougule (Exh-28 and Exh-29 respectfully). Son of the scribe namely Bhalchandra Dhondu Kulkarni (Exh-34) and witness Mallappa Shankar Bolaj (Exh-38). As against this, the Respondent No.2 examined himself. The Petitioner also produced alleged will. After considering the evidence on record the Learned Trial Judge came to the conclusion that the Petitioners failed to prove proper execution and attestation of the will in question and they are not entitled to get relief as claimed. Naturally, he dismissed the Petition.

6. Being aggrieved by the said order, the original Petitioner filed Regular Civil Appeal No.300 of 1985 in the Court of 2nd Additional District Judge, Sangli. The said Court also held that execution and attestation of will is not duly proved as required under section 63 of

the Indian Succession Act, 1925. He, therefore, dismissed the appeal.

7. The above mentioned order is challenged in the present Second Appeal.

8. While admitting the appeal, this Court *(Coram : A.A. Desai, J.)* has passed the following order :-

> *"Admit on ground No.2"*
>
> *The said ground is as under :-*
>
> *" Whether in view of the fact that the attesting witness who turned hostile and who admitted their signatures below the will and the signature of the testator Krishna, the will ought to have been held as proved ? "*

9. In this appeal before me the learned Advocate for the Appellant/original Petitioner has urged only one point. He submitted that both the Courts below have not properly appreciated the evidence on record and have wrongly held that the will in question is not duly proved as required by section 63 of the Indian Succession Act, 1925. According to him, the Courts

below ought to have given importance to the evidence of the son of the scribe and accepted the evidence when the will in question is a registered will. He, therefore, submitted that relying on the evidence of Bhalchandra Diwale as well as the son of the scribe and the Registrar's Endorsement, it should have been held that there is compliance of Section 63 of the Indian Succession Act. He, therefore, submitted that the order passed by the First Appellate Court be set aside and letters of administration be granted in favour of Original Petitioner. As against this, Shri Ingale, Learned Advocate for the Respondent supported the judgement and order passed by the Courts below and submitted that there is in fact no substantial question of law involved in this Second Appeal and so having regard to the original sub-section 100 of the Code of Civil Procedure, the appeal be dismissed.

10. The relations between the parties is not in dispute. It is the case of the Appellant/Original Petitioners that Late Krishna Keripale has executed a will in question and the same is attested by witness Bhalchandra Diwale (Exh-28) and Dhondiram Chougule (Exh-29). The will is written by the father of PW-3

Bhalchandra Kulkarni. So, we have to carefully scrutinize the evidence on record and find out whether the provisions of section 63 of the Indian Succession Act, 1925 are complied. The said section runs as follows :-

> *" **Execution of unprivileged wills** – Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules :-*
>
> ***(a)** The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
>
> ***(b)** The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
>
> ***(c)** The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign*

the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary. "

11. It is needless to say that for the proper compliance of the above mentioned provisions propounder has to establish that the testator signed the will in presence of the attesting witnesses and the attesting witnesses signed the will in presence of the testator. It is true that the testator can acknowledge his signature before the attesting witnesses and in such a case also if the witness makes his signature, the attestation is valid. It is also well settled that if the attesting witnesses sign the will at different times then executent has to acknowledge his signature to other attesting witnesses. So, bearing in mind this

position, we have to see as to what the attesting witnesses in the instant case have said.

12. At the outset, it must be mentioned that so far as the original petitioner No.1 Parvati Keripale is concerned, her evidence is absolutely of no use to prove the point regarding valid execution and attestation because admittedly, she was not present at the time when the alleged will was executed.

13. So far as the alleged attesting witness Bhalchandra Diwale (Exh-28) is concerned, he has stated that Late Krishna had brought one document to his house and he told him that he had executed a Will and that he should sign and accordingly, he signed the said document. However, he has shown ignorance about the contents of the said document. He specifically stated that his first signature on that document was forged one and he has no knowledge as to what happened to that document thereafter. When it was noticed that the said witness was not supporting the petitioners, he was confronted with his affidavit which was filed by him. However, even thereafter, he submitted that the contents of the documents were not read over to him and

he singed it merely because the clerk asked him to sign. It is pertinent to note that this witness has studied upto B.Sc. B-ed. and was working as a teacher. So, it is difficult to believe that such a witness would sign the affidavit without knowing contents of the same. Thus, though said witness has been declared hostile and permission was sought by the learned Advocate for the Petitioners to put questions in the nature of cross-examination and subsequently, he has stated that when Late Krishna had come to his house, he told him that he had executed a will and he would be putting his thumb impression and accordingly, he put his thumb impression and he (witness) also put his signature. So, relying on this statement of Bhalchandra Diwale, it can be said that he has signed the will as an attesting witness. However, the question arises, whether that by itself is sufficient to hold that there is proper compliance of section 63 of the Indian Succession Act, 1925.

14. As per the above mentioned Statutory provision a will has to be attested by two witnesses. So, we have to find out whether there is sufficient evidence to show that the will was attested by two witnesses as

required by section 63 of the Indian Succession Act, 1925.

15. It is the case of the Petitioners that other attesting witnesses was Dhondiram Chougule. He has been examined at Exh-29. He has stated that Parvati Keripale i.e. wife of Late Krishna had brought one document to his house and she asked him to put his signature on that document and accordingly, he put the same. This witness is also declared hostile. However, it must be noted that there is nothing in his cross-examination which would indicate that the said witness has been won over by the other side i.e. Respondent. He has not even stated as to whether there was other signature when he put his signature. There is nothing on record to show that Krishna had accompanied Parvati at that time or that Krishna put his thumb impression in presence of this witness nor there is evidence to show that this witness put the signature in presence of Krishna. So, it is crystal clear that the evidence of this witness is absolutely of no use to Appellant-original Petitioners to show that this witness has signed the will in question as an attesting witness.

16. The learned advocate for the Appellant strenuously argued before me that circumstances may arise when due to certain reasons the attesting witnesses may turn hostile or they may join hands with the other side. But in such cases, the Court has to take into consideration all other facts and circumstances and find out whether the execution and attestation as required by section 63 of the Indian Succession Act is carried out or not. For this proposition, he has placed reliance on a case **Ujgar Singh V/s. Chanan Singh and others AIR 1986 PUNJAB AND HARYANA 230** wherein the learned Single Judge of the said Court observed that in the matter of a will, all the proof contemplated by section 68 can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses. However, facts of the said case and the facts of the case in hand are quite different. In that case, one of the attesting witnesses had clearly supported the execution and the scribe of the will had also fully supported and given evidence to show that the will in question was executed by the testator and the scribe also signed the same in presence of the

testator. So, under the peculiar circumstances, the above mentioned observations were made by the learned Single Judge. However, in the instant case, according to Petitioners, the will in question was written by one Dhondiram Kulkarni as at the time of the trial he had expired, his son Bhalchandra Kulkarni was examined at Exh-34. It must be noted that the said witness has only identified hand writing of his father and his signature. But he has nowhere specifically stated that the said document was written in his presence or that in his presence Late Krishna put his thumb impression either in his presence or in presence of his father and thereafter, his father signed the will in presence of Late Krishna. When such specific statements are not made by the witness Bhalchandra Kulkarni, we can not jump to the conclusion that his evidence is sufficient to hold that there was proper compliance of section 63 of Indian Succession Act, 1925. On the contrary, while appreciating his evidence, one can not ignore the observations made by the Apex Court in a Case **N.Kamalam and another V/s. Ayyasamy and another (2001) 7 Supreme Court Cases 503** wherein Their Lordship have observed that the evidence of scribe could not displace statutory requirement as he did not have necessary

intent to attest. So his signature can not be granted equality of status with signatures of attesting witnesses, which are required under section 63(C) of the Indian Succession Act read with Section 68 of Evidence Act. So, I have absolutely no hesitation to hold that the evidence of Bhalchandra Kulkarni in the instant case is not sufficient to hold that there was proper compliance of section 63(C) of the Indian Succession Act. Shri Apte, learned Advocate for the Appellant ingeniously argued before me that in the instant case the will is registered. So, relying on the endorsement and signatures made by the Registrar of Deeds, it can be said that the will in question is attested by two witnesses. For this proposition, he has placed reliance on a case **Bhagatram and another V/s. Suresh and others (2003) 12 Supreme Court Cases 35.** However careful reading of the authority shows that Their Lordship of the Apex Court have in fact observed in the said case that endorsement made by the Registrar of Deed or any registering officer in discharge of his statutory duties by themselves do not elevate him to the status of a Statutory attesting witness. However, such registering officer can be treated as an attesting witness if it can be shown that he had the requisite

animo attestandi. Before the Registering officer can be termed as attesting witness, he shall have to be called to the witness box and the Court has to be satisfied with his testimony. In peculiar circumstances, Registrar can be treated as having attested a will if his signature or mark appears on document akin to the one placed by an attesting witness and he has seen the testator signing or affixing his mark to the will or has received from the testator a personal acknowledged of his signature or mark and he has also signed in the presence of the testator. However, in the instant case, firstly it must be noted that though alleged will is written and executed on 09/04/1974, the same is produced before the Registrar on 10/04/1974. The endorsement made by the Registrar only says that Krishna Keripale admitted the execution of so called will and gave his thumb impression. It is pertinent to note that below this endorsement, there is one thumb impression but the said thumb impression is not specifically attested by any other persons as testator. The evidence of witness Mallappa Shankar Bolaj also only shows that he identified Krishna Keripale to the Registrar. There is absolutely nothing in this document which would be sufficient to hold that the Registrar

put his signature in presence of the testator so as to fulfill the requirements of section 63(C) of the Indian Succession Act. Admittedly, the said Registrar is not examined in the instant case. So taking into consideration all these facts and circumstances both the Courts below have recorded concurrent findings of the fact that the original Petitioners have failed to prove that the will in question is executed by complying the provisions of section 63(C) of the Indian Succession Act. There is nothing on record to show that the Courts below have not taken into consideration any particular evidence. Nor it can be said that the appreciation of evidence done by the Courts below is perverse. On the contrary, even after examining the entire evidence, I am also of the view that the original Petitioners have certainly failed to prove the proper execution and attestation of the will as required by section 63(C) of the Indian Succession Act, 1925 and Section 68 of Indian Evidence Act.

17. Thus, there is in fact no substantial question of law involved in this matter and there is absolutely no necessity to interfere with the findings recorded by the learned Additional District Judge.

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18. In this view of the matter, there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J)

.../-